

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

ROBERT J. GLADWIN, Judge

CA06-31

ROBERT MEYER d/b/a MEYER
EXCAVATORS CONTRACTORS

SEPTEMBER 27, 2006

APPELLANT

APPEAL FROM THE PULASKI
COUNTY COURT
[NO. CV02-6804]

V.

CDI CONTRACTORS, LLC

HON. JAMES MOODY,
JUDGE

APPELLEE

APPEAL DISMISSED

This appeal, which follows the entry of summary judgment for one party, must be dismissed because the record does not reflect that a final order has been entered by the circuit court.

Appellant Robert Meyer, d/b/a Meyer Excavators Contractors, sued appellee CDI Contractors, LLC, in the Pulaski County Circuit Court in July 2002 for fraud and breach of a subcontract with appellee to perform earthwork on a building project for the Church at Rock Creek. Appellee defended on the ground that an unavoidable event had rendered the contract impossible to perform and prayed that it be discharged from its obligation. Appellee filed a counterclaim against appellant in March 2003. Appellee moved for a non-suit on its counterclaim against appellant on December 6, 2004. The record, however, does not contain a ruling by the circuit court on that motion.

Appellee filed a motion for summary judgment in June 2005, asserting that appellant was barred from bringing any of his claims because he had entered into the contract in violation of the Arkansas Contractors Licensing Law. On July 26, 2005, the circuit court entered an order granting appellee's motion for summary judgment, finding that, because appellant had obtained his contractor's license by submitting false information to the Arkansas Contractors Licensing Board and had entered into the contract with appellee in violation of the licensing statutes, his claims were statutorily barred. Appellee moved for an award of attorney's fees on July 29, 2005. Appellant filed a response to the motion for fees, arguing that an award of fees was not proper because this case sounded primarily in tort and because appellee prevailed on a "technical punitive statute."

On September 12, 2005, relying on Ark. R. App. P. 4(b), appellant filed a motion to extend the time to file an appeal from the summary judgment, supported by the affidavit of his attorney, Stephen Bilheimer, on the ground that his counsel had not seen the precedent and had been unaware of the entry of the summary judgment. He alleged that, after the circuit court instructed counsel for appellee to prepare a precedent and to deliver it to appellant's counsel for review, appellee's counsel sent an e-mail attaching a precedent to the court's law clerk, with a copy to Mr. Bilheimer at an incorrect e-mail address, on July 18, 2005; that, on July 19, 2005, the court's law clerk attempted to e-mail Mr. Bilheimer at the same incorrect address; that Mr. Bilheimer did not receive the e-mails or any other type of communication regarding the precedent; that he learned of the entry of the order on

September 7, 2005; and that, until that date, he believed that appellee was waiting for a determination of attorney's fees before submitting a precedent.

The circuit court entered an order granting attorney's fees to appellee in the amount of \$40,000 on September 14, 2005. On September 19, 2005, appellee filed a response in opposition to appellant's motion for an extension of time to file an appeal, arguing that appellant's counsel had not exercised reasonable diligence in monitoring the docket. On October 11, 2005, the circuit court entered an order granting appellant's motion to extend time to file an appeal. Designating the entire record, appellant filed a notice of appeal on October 13, 2005, from "the Order Granting CDI's Motion for Attorney Fees in favor of CDI Contractors, LLC against Robert Meyer d/b/a Meyer Excavators Contractors entered in this case on September 14, 2005." Neither the abstract nor the record contains a supplemental notice of appeal from the summary judgment. Appellee filed a notice of cross-appeal on October 20, 2005, from the order granting appellant's motion to extend time for filing an appeal.

Because this record contains no order dismissing appellee's counterclaim, this case is not final for purposes of appeal. Even when a circuit court enters judgment against a plaintiff, the decree is not appealable until an order dealing with the defendant's counterclaim is entered. An appeal can be taken from a judgment that does not adjudicate all of the claims of the parties if the circuit court executes a certificate, as provided in Ark. R. Civ. P. 54(b), which provides in pertinent part:

(1) *Certification of Final Judgment*. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment....

(2) *Lack of Certification*. Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order, or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

The fundamental policy behind Rule 54(b) is to avoid piecemeal appeals. *Chapman v. Wal-Mart Stores, Inc.*, 351 Ark. 1, 89 S.W.3d 906 (2002). Even though an issue might be an important one, if the decision does not conclude the merits of a case, an appeal would be premature. *Id.* The failure to comply with Rule 54(b) and to adjudicate fewer than all of the claims against all parties is jurisdictional and renders the matter not final for purposes of appeal. *Seay v. C.A.R. Transp. Brokerage Co.*, ___ Ark. ___, ___ S.W.3d ___ (June 15, 2006); *Dodge v. Lee*, 350 Ark. 480, 88 S.W.3d 843 (2002). Because this court lacks jurisdiction, we dismiss this appeal without prejudice.

Dismissed.

ROBBINS and BAKER, JJ., agree.